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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-730

JOHN C. ROEMER, III, EDWARD E. DOERR,
KENNETH A. STEVENS, AND
CYNTHIA KOONCE MILLER,

Appellants,

v.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, GOVERNOR; LOUIS L. GOLDSTEIN, COMPTROLLER; JOHN A. LUETKEMEYER, TREASURER; COLLEGE OF NOTRE DAME OF MARYLAND, INC.; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.; AND THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE IN THE CITY OF BALTIMORE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
for the DISTRICT OF MARYLAND

BRIEF FOR THE COLLEGE OF NOTRE DAME OF MARYLAND, INC.

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OPINION, JURISDICTION & CONSTITUTIONAL AND STATUTORY PROVISIONS

This Appellee Defendant accepts the Appellants statements concerning the opinion below, the jurisdictional grounds, and the constitutional and statutory provisions involved.

QUESTIONS PRESENTED

1. Does the Maryland College aid program have a primary effect of advancing or inhibiting religion in violation of the First Amendment?

2. Does the Maryland College aid program entail excessive governmental entanglement with religion in violation of the First Amendment?

3. If the Maryland College aid program is held unconstitutional, should the Appellee colleges be required to repay the funds which were paid to them without Court restraint during a period when the program had been declared constitutional?

STATEMENT OF THE CASE

To avoid unnecessary repetition, this Appellant adopts the following portions of the "*Statement of the Case*", viz. "*A. The Challenged Statute.*" "*B. The Proceedings Below,*" and "*C. The Decision Below,*" set forth in the Brief of Appellees Loyola College and Mount Saint Mary's College (pp. 3-12).

However, the relevant particulars as to this Appellee, the College of Notre Dame of Maryland, Inc., require special statement. The Appellants have exhaustively combed over all operations of the Appellee colleges, selected every possible religious aspect, massed these up out of context, and sought to give the impression of old-fashioned sectarian institutions devoted to promoting Catholicism.

Such an impression is totally false. Whatever the historical reasons for the not-uncommon assumption that an educational institution sponsored and partly staffed by Sisters and serving students who are mostly Catholics is *per se* sectarian, the assumption is no longer justified as applied to this liberal arts college.

To make this clear it is important to outline both what Notre Dame *is not* and what it *is*.

We will describe the negative aspects first in order to develop the contours of the picture before filling in the content:—

What Notre Dame is Not.

(a) The often and clearly stated purpose of the College is, not to teach or propagate Catholicism or religion, but to give a liberal arts education to women. See Charter (NDX 1); By Laws NDX 58; Tr. 425-6, 464. Catalogues esp. 1971-1972, page 9, NDX 56-57.

(b) The College is not financed by the Church Tr. 463.

(c) The church hierarchy has no power to control the educational program of the college, and does not attempt to exercise any control Tr. 464.

(d) Religion does not influence the formation of the curriculum, the selection of textbooks, or the mode of teaching courses, except in so far as the Religious Studies Department is necessarily dealing with religion. In no course, including theology, is there any indoctrination or proselytizing with respect to any religion. All courses are taught as academic disciplines and there is no attempt to indoctrinate or proselytize. There is no interference with academic freedom of the faculty Tr. 459, 557, 566, 601, 458, 507-8. See NDX 586 (book list). Fr. Satterfields deposition, NDX 71 C, p. 38.

(e) Students are not recruited or selected on a religious basis Tr. 433. It is not true to say there is a *de facto* restriction on admissions. All faiths are welcomed. The applicant's religion is not even asked. If certain Catholic sources of student applications are tapped, that is in order to fill the roster from sources

which have in the past provided qualified applicants, not to establish a predominant group Tr. 433-35.

(f) Student aid is not granted or withheld on the basis of religious affiliation. Sisters, parochial school teachers, and Continuing Education students who enroll, if otherwise qualified academically, are given discounts because of their limited financial means Tr. 436-8. Obviously the latter two groups are not necessarily Catholics — any person regardless of religion could belong to either category.

(g) The granting of degrees has no relation to religion or religious beliefs or religious habits of the student Tr. 461.

(h) Students are not required to conduct themselves in accordance with any specific church rules, nor are they disciplined on the basis of breaking any such rules, as distinct from general moral rules of the Western Judeo-Christian heritage common to most colleges. See Tr. 493, Tr. 431, 504-5.

(i) Students are not required to attend any religious services or religious retreats Tr. 430.

(j) Neither the students nor the faculty are required to say prayers in classes and both are free to do as they see fit Tr. 460.

(k) The faculty is not selected on a religious basis except theoretically if a vacancy is involved in the Theology Department for teaching a theology course dealing with Catholicism, in which case the person having the best academic qualifications in this area would probably be a Catholic. Preference may occasionally be given to an academically qualified Sister to fill a vacancy, but this is for manpower and economic reasons, not religious reasons Tr. 569, 598, 544, 488-50, 532, 600, (Testimony of heads of departments.)

(l) The faculty, including Sisters, may wear any garb they choose; no religious garb is required Tr. 447-8.

(m) Theology courses are not limited to courses about the Roman Catholic religion (See Catalogue), Tr. 534.

What Notre Dame Is.

Notre Dame is an accredited liberal arts college for women which grants only the degree of Bachelor of Arts Tr. 460-1. Catalogues Tr. 425-6. Charter. It is a non-stock, non-profit corporation Tr. 420.

It was founded and is sponsored by the School Sisters of Notre Dame, a religious congregation of the Roman Catholic Church Tr. 424-5.

It is supported by tuition payments, gifts, and endowment income, and by services contributed by the Sisters Tr. 463.

The faculty consists of approximately 72 members of whom less than half are School Sisters Tr. 469. The faculty is selected according to academic competence and without regard to religion Tr. 544, 448-50, 532, 600, 607, 622-23, 625, 569, 598.

The college subscribes to the Principles of academic freedom of the A.A.U.P. Tr. 458-9. NDX 2. There is no evidence whatever that the College has ever intruded on the academic freedom of any member of the faculty. See Courts findings, pp. 3, 5.

The student body is selected without regard to religion and there is no attempt to find out an applicants religion Tr. 33, 575, 434, 575-76-77. Students of all faiths or no faiths are welcome if they are otherwise qualified. The reason for the predominance of Catholics in the student body is basically historical and related to the sources from which applicants naturally flow Tr. 434, See 518, 575.

Student discipline resembles that of other colleges. There are no disciplinary rules of a strictly Christian or Catholic character Tr. 431, 504-5, 537-9.

There is a chapel and a chaplain and for the convenience of the many Catholics there is daily mass in the Chapel. No student is required to attend any religious services Tr. 430, 475, 590.

The academic program consists of approximately 287 courses offered through 16 departments, each headed by a chairman. The Departments are: Art, Biological Sciences, Chemistry, Classical Languages and Literature, Drama, Economics, and Political Science, Education, English, History, Mathematics, Modern Foreign Languages, Music, Philosophy, Physical Education, Physics, Psychology, Religious Studies, Sociology.

Of the 287 courses, there are approximately 7 offered in the Theology Department.

A Student is required to take 32 courses and three January Terms equivalent altogether to 35 courses, at four credits each, which comes to a required total of 140 credits Tr. 452, Catalogue. The Faculty Curriculum Committee about two years ago instituted a core curriculum which consisted of ten courses which the student has to take sometime during the four years. These ten courses are as follows:

English	2 courses
Foreign Language	1 course
Natural Science	1 course
Philosphy	2 courses
Religious Studies	2 courses
Social Science	1 course
An interdisciplinary seminar for Freshman	1 course

The philosophy behind the core curriculum is that students should be given various approaches to knowledge, i.e., language, science, philosophy, theology, social studies, English, Tr. 452. The curriculum, which leads to a B.A. degree, "attempts to acquaint each student with the key areas of learning and to provide in-depth study a wide elective choice and some non-traditional education experience." The curriculum is comprised of three parts: The general (or core curriculum) requirements, the concentration requirements and electives. (Catalogues)

The student is required to concentrate for a major in one or more of the departmental fields of her choice, although other majors may be structured such as premedical in the chemistry and biology departments. The student usually takes about ten courses in her major Tr. 454-456.

Through a cooperative academic program with Loyola College, students may also major in Speech Pathology, Business Administration, German and Russian. Any elective course on Loyola's campus is open to Notre Dame students and any elective course on the Notre Dame campus is open to Loyola students. There has been an extensive cross-taking of courses by Loyola students in Notre Dame, and visa versa Tr. 426-7, 454.

To graduate, a student must successfuly complete the general education and concentration requirements of elective courses that total 35 Tr. 452. Students may major in areas that the College does not have a major in by taking courses at Loyola Tr. 454.

The College offers only the Bachelor of Arts degrees, so that there is no degree in Theology Tr. 461. There is

no religious consideration involved in the granting of a degree to a girl who is graduating. The degree requirements are all academic Tr. 461.

Thus the curriculum is typical of a liberal arts college in its contents, mode of teaching, textbooks, etc. There is no attempt to indoctrinate, slant, or to distort in order to proprogate any Catholic or other religious views.

There is no policy regarding the saying of prayers in classrooms, this being a matter of the teacher's choice and in no case are the students required to join Tr. 460. It is impossible to tell exactly the percentage of classes in which there are prayers because no records are kept in classes where prayer may sometimes be said; it is only rarely Tr. 507-8.

The Religious Study Department, headed by Rev. Carroll Satterfield and comprising four other teachers, (one Priest, two Sisters, and one layman) (Tr. 532-3) offers 7 or 8 courses, (Tr. 533).

The courses are not limited to specifically Catholic theology. The religious studies courses are taught as an academic discipline and as an aspect of the human experience. As with other courses, there is no attempt to indoctrinate or proselytize. Again, there is no attempt to slant, distort, suppress or otherwise persuade to a particular point of view. (Satterfield deposition, NDX 71 C, p. 38, 36-37, 39-40).

The College has the religious studies in the core curriculum because it feels that the liberal arts college would investigate the various areas of the human experience and among these, for instance, are the scientific area, the linguistic, or language area and so on, and the area of ultimates, philosophy, and the religious experience as an experience that comes up in

the human experience, Satterfield deposition, p. 45, 36 (NDX 71 C).

In addition to the regular scholastic curriculum, the College is involved in various community service programs, dealing for example with drama, economics, political science, performing arts and lectures Tr. 441-446.

There is also a Continuing Education Program aimed at adult women who want to return to formal education and possibly obtain a degree Tr. 438-9. There is no inquiry into the applicants religious preferences.

There are some crucifixes, statues and other religious symbols, in a number of buildings and classrooms Tr. 478. The decor of a domitory room is up to the students Tr. 465.

Thus in summary, the Appellee, the College of Notre Dame of Maryland, Inc., is fairly typical of a 4 year liberal arts college for women: — that is to say, it is an institution which offers some 287 courses (of which only 7 or so are in theology), through 16 basic departments of learning (only one of which is religious studies); — it has a standard system of a core curriculum, elective majors and credits; — a program for continuous adult education; — community service programs, including lecture series, performing arts activities, volunteer services, and other community services. It is in no sense a religious or sectarian institution.

SUMMARY OF ARGUMENT

I.

The critical practical point before the Court for decision is whether or not the case of *Tilton v. Richardson,* 403 U.S. 672 (1971) requires a finding for the Appellee colleges.

This resolves itself into two questions:

(a) on the one hand whether the Appellee colleges are significantly different from the *Tilton* case colleges, and

(b) on the other hand whether the nature of the public program of aid is significantly different so as to call for a different result than in the *Tilton* case.

As to (a) the evidence is overwhelming that the colleges are almost identical with the *Tilton* case colleges; any differences being minor and in some cases more favorable to the Appellee colleges.

As to (b) there is no constitutionally significant difference between (1) a single program of grants whereunder a college can obtain funds to erect a building of more or less any type it wants so long as it is non-sectarian, and (2) a program of annual grants whereunder the college can obtain funds for such secular use as it elects so long as the use is non-sectarian. In neither case is there a primary effect of enhancing religion. And in neither case is there excessive government entanglement. It is no more difficult, or judgmental, or divisive, or entangling, to ensure that a building is not used from year to year for religious purposes than it is to ensure that an annual grant for non-sectarian purposes is not used for religious purposes. The problem of what happens in a building is ongoing. Moreover, the *Tilton* case could hardly mean that annual construction grants were not permissible, and that a program is only constitutionally valid if for one year.

II.

The Court should not apply to the Appellee colleges standards regarding permissible or impermissible religious features which it is not prepared to apply to all liberal arts colleges and universities. It is well known that most private liberal arts colleges have chapels, chaplains and religious services, together with departments of religious studies and the teachers therefor. Many of them have religious symbols very much in evidence.

If the Court is not prepared to say that general grants paid to Harvard or the University of Virginia or Princeton, or the like, where these features are present, are unconstitutional, because the funds might indirectly subsidize the religious activities, or the teachers, or the buildings where prayers might be said, it should not do so with the Appellee colleges.

There is a balanced perspective necessary in First Amendment cases, and the need to treat equals equally, free of historically based prejudices.

III.

If the Grants are held unconstitutional repayment should not be required. The colleges were all hard pressed financially and timely payment is of the essence. It would be a greater hardship and injustice to have much needed funds held up during years of litigation in the event the grants are ultimately declared constitutional, than to permit the colleges to retain the money if the grants are ultimately declared unconstitutional. The damage to the college would be enormous, whereas the damage to the taxpayers would be minimal, and indeed in the instant case, nonexistent. For the potential danger of misuse of funds for religious funds in fact did not occur and will not occur, because

the colleges have been most careful to allocate the funds to items that are indisputably secular.

The funds were not paid out to the colleges nor spent by the colleges unreasonably, for both the State and the colleges were reassured by the *Tilton* decision and by the decision of the District Court before the payment was made. Furthermore the payment was not made until after both the Federal Court and the Supreme Court were requested to enjoin it and refused to do so.

The colleges have, detrimentally to themselves, relied upon the payments to meet their budgeted needs. They have no way of recouping the funds spent for goods and services.

ARGUMENT

I.

THE PRINCIPLES, AND THE APPLICATION THEREOF, IN *TILTON v. RICHARDSON* REQUIRE A FINDING FOR THE APPELLEES

All parties appear to agree that the underlying tests of constitutional validity at issue in this case are the requirement of no primary effect to enhance religion and the requirement of no excessive government entanglement.

The general law, the historical background and the cases are fully developed in the Briefs submitted on behalf of Loyola College and Mount St. Mary's College and on behalf of Saint Josephs College. The Appellee identifies itself with the positions and arguments therein presented. Rather than simply repeat them, this Appellee will attempt to focus on what seems to it to be the ultimate practical issue before the Court for decision.

Striped of all background analyses, this issue is whether or not the case of *Tilton vs. Richardson,* 403, *U.S.*672 (1971), requires a finding favorable to the Appellee colleges. The District Court as well as all parties either directly or indirectly acknowledge the centrality of the *Tilton* case. Church-related liberal arts colleges were involved; the primary effect and the excessive entanglement requirements were at issue; the decisions was favorable to the colleges; and the case is recent.

This issue resolves itself into two questions, both bearing on the application of the primary effect test and of the excessive entanglement test:

(a) Are the Appellee colleges significantly different from the *Tilton* case colleges; and

(b) Is the nature of the program of aid significantly different so as to call for a different result.

A.

The Appellee colleges do not significantly differ from the colleges in the Tilton case.

To do justice to this point, it is necessary not only to read the opinion of the Court in the *Tilton* case, but to go behind the opinion to the supporting record since the Opinion singled out for special mention only part of the features of the colleges.

From both sources, it appears indisputable that, like the Appellee colleges, the *Tilton* colleges were liberal arts colleges sponsored by Catholic organizations; that the student body was primarily Catholic, although there were no religious restrictions on admission; that the faculties were predominantly Catholic; that the colleges gave rounded academic programs and curriculums which were taught in an academic way without

indoctrination; that there was a policy of academic freedom; that the colleges had chapels, chaplains, and religious services, but there was no required attendance at any religious activities; that they had departments of theology, and students were required to take courses in theology; that there were religious symbols and dress in evidence; that there were prayers in classrooms said on a voluntary basis; that there was no compulsion of obedience to any doctrine or dogmas of the faith.

The distinctions suggested by Appellant (p. 21) are that the Appellees had a policy or practice of favoring members of the sponsoring religion for certain faculty appointments; that recruiting practices limited entry to Catholic students; that daily opportunities for worship were limited to Roman Catholics; and that the method of teaching theology in the Appellee college was either admittedly for religious purposes or could be potentially taught in a religious manner.

The aforegoing points are simply not upheld by the record.

In the first place there is no showing that the *Tilton* case differed as to faculty appointments or that the occasional Appellee practice of selecting a sister amounted to anything more than a matter of saving money in a tight financial situation or of having the most fit teacher for the particular subject.

As to recruiting, it is grossly unfair to suggest that entry is limited in a large measure to Catholic students. Girls of all backgrounds are welcome and in fact sought after. The predominance of Catholics is a result of history, family tradition, and recruiting students from where the College could get them in a very competitive market.

As to opportunities to worship, the Appellant overlooks the fact that in the *Tilton* colleges, the opportunities for worship were limited to Roman Catholic services. The essential point in the Court's mind, true of the *Tilton* as well as the Appellee colleges, was that attendance at services was purely voluntary.

Finally, as to a supposed difference between the methods of teaching theology, the record does not show any difference. It is true that it was stipulated in Tilton that theology was taught in an academic manner; but it is equally true that the records show that the College of Notre Dame of Maryland, Inc. actually teaches theology in an academic manner free of any indoctrinating or proselytizing approach.

The record in the instant represents an exhaustive presentation of all the facts regarding each college, amassed in the greatest detail and under the sharpest probing by the Appellants. The Judge who heard the presentation found that the Appellee colleges were truly academically free, non-indoctrinating, liberal arts colleges. And he found no significant difference between them and the *Tilton* colleges.

Since the two sets of colleges, *Tilton* and the Appellees, are so much alike, it becomes unnecessary to discuss the tests of primary effect and excessive entanglement insofar as the nature of the college is concerned.

B.

The nature of the program of aid does not significantly differ from that in the Tilton case insofar as the Fourteenth Amendment is concerned.

In both the *Tilton* program and the instant program there was a prohibition against use of the funds for

sectarian religious purposes. The only difference between the programs is that in the *Tilton* program there were single grants to colleges for building facilities of the type the college chose; whereas in the instant case, the program contemplates annual grants for any purpose chosen by the college, whether buildings or something else. Under the Maryland program an elaborate screening mechanism has been established to determine who shall receive the grants and to ensure that the grants are properly used.

The Appellant suggests that a "one-time grant" is less dangerous and more controllable than a series of annual grants. They further suggest that a "construction grant" is less dangerous and more controllable than a "general purpose" grant. Each of these distinctions bears on the application of each of the tests of primary effect and excessive entanglement; and they will be discussed under both headings.

Primary Effect

The Appellants argue that the *primary effect* of the State "general purpose" grants is to advance religion in that (a) the aid program failed to guarantee that the funds would not advance religion in respect to use for teachers salaries, scholarships and maintenance of buildings; (b) the funds would support classes where prayers were sometime said, albeit voluntarily; (c) the funds were in support of institutions with alleged religious restrictions on faculty appointments (not true) and on student admissions (not true); and (d) the funds would support institutions which have a few compulsory theology courses and which provide some religious opportunities and services on a voluntary basis.

The District Court fully dealt with the problem in the light of the principles laid down by the Supreme Court

and in the light of the guiding applications thereof by the Supreme Court in the leading cases. The Supreme Court in *Hunt v. McNair*, 413 U.S. 734 (1973) has distinguished two applications of the "primary effect" rule:

> 1. There can be no aid to an institution which is essentially sectarian. It is clear from the Findings of Fact and the Opinion (including the dissent) that this is inapplicable to the Appellee institutions in this case; they are liberal arts colleges as in *Tilton*, and not sectarian institutions.
>
> 2. There can be no aid which funds a specifically religious activity in an otherwise substantially secular setting.

It is chiefly this last principle which Appellants charge to be violated in this case. The answer to Appellants charge is that: (a) the Appellee institutions are essentially secular; (b) that any sectarian activities are clearly separable from the secular activity; (c) that the State aid statute specifically forbids use of the funds for sectarian purposes; and (d) that the administrative agency is adequate to screen institutions and to verify and enforce this required secular use. Therefore the aid cannot have the primary effect charged, if properly administered.

In short, both the spirit and letter of the Supreme Court's tests have been complied with. If the funds are, or will be, used exclusively for non-sectarian purposes, as they must be under the law, it can hardly be said that they are, or will be, used to advance religion in any of the senses charged by the Appellants.

As far as primary effect is concerned, there is no logical difference between a grant for specific secularly-used buildings (as in *Tilton*) and a grant for a range of possible secular purposes. A secular purpose is a secular purpose in either case. The only essential point is that

the grant be earmarked and used for secular purposes. There is nothing in the cases, or law or in logic, that makes it essential that the particular, specific earmarking of the fund within the ambit of all possible secular uses be fixed at the legislative level. In fact, it would seem highly desirable to permit aided colleges to have flexibility of use within the constitutionally permissible range of secular uses, as long as there is adequate regulatory provision for accurate and relatively simple checking out proper use.

The only question as far as primary effect is concerned, is whether or not the State can ensure a clear and an easily checked earmarking of the funds for secular use. Counsel for an Amicus Curiae raises a specter of the supposed impossibility of segregating the secular from the sectarian use of funds under a general grant; suggesting that there would be an inevitable mingling of uses in such matters as the cost of grounds keeping, clearing snow, utilities, air conditioning, or in the use of typewriters, telephones, computers and school supplies. We submit that this can be done and has been done with the greatest ease. For perhaps 95% or more of the college's operations have nothing whatever to do with religion and therefore it is quite easy to specifically allocate the funds to these activities which are indisputably and separably secular, whether this is for constructing a building, buying equipment, purchasing books, improving athletic facilities, or any one of hundreds of indisputably secular activities. The limiting of the grant to buildings as against other secular purposes does not make the secular application any more certain. Who is to say, for example, that a so called music building, a dormitory, or an arts and drama building, will never have prayers said in them or religious services held in

them or theology taught in them. Yet the Supreme Court was willing to uphold a program where the secularity of the use was essentially established by classification of the type of building. If buildings can be classified, so can supplies and services.

Counsel's argument prove too much. For it would invalidate general public grants to universities, like Harvard or Yale, which have chapels, chaplains, religious studies, and even Divinity Schools.

We submit that it is relatively simple to establish a system to ensure a secular use of the funds so that there can be no primary effect to aid religion. In the last resort, the Appellants case must therefore come down to this, whether such a system would involve an excessive government entanglement with religion.

Entanglement

The Appellants suggest that the kind of verification required in the use of a general grant would involve the kind of "leaning-over-the-shoulder" monitoring feared in the case of grants to parochial schools. This is obviously not true. Parochial schools have a clear sectarian purpose unlike the Appellee colleges, and in such schools there is a potential in the manner of teaching which could involve use of the funds to support religion.

Appellants further say that the situation is unlike that in the *Tilton* case because

(a) The grants are not for "religiously neutral facilities" and (b) the grants are not one time, single purpose grants but involve on-going annual grants which would require continuous governmental audits and judgmental monitoring of the institutions.

These points were fully and directly dealt with by the District Court.

As to (a) it was pointed out that the distinction between *Tilton* and this case was more apparent than real. The difference between "construction grants" for buildings intended for secular use and grants which are "non-categorical" as to type of secular use but which are restricted by a general, all-encompassing legal prohibition against use for *any* sectarian purpose whatever is a distinction which "does not rise to constitutional dimensions" (A-17 of Opinion in Appellants' Jurisdictional Statement). After all, it is not verifying the type of building, but *verifying what happens in the building over the years*, that gives rise to the possibility of entanglement. As the District Court said "The classroom building provided in *Tilton* and *Hunt* are no more neutral in the abstract than the classroom buildings which were maintained with public funds in *Nyquist*" (A-15).

The Appellants are attempting to convert the Supreme Court's observations in the *Tilton* case to the effect that payments for "ideologically neutral" buildings "reduced" the danger of entanglement (p. 686) into a formal Supreme Court requirement for constitutional validity of a grant.

As to (b), i.e., the danger arising out of on-going financial entanglement because the aid is not in the form of a single grant, again the District Court fully considered this and found that the continuing nature of the grants was not constitutionally fatal. For, after all, even in *Tilton*, where one time construction grants were permissible, there would obviously be

> "required a continuing and perpetual involvement of the government with the schools to ensure that publicly financed buildings would never be used for sectarian purposes" (J.S. pp. A-20).

Further, as the District Court noted, in *Hunt v. McNair*, 413 U.S. 734 (1973)

> "The Supreme Court found the South Carolina Statute to be constitutional even though it established a school governmental relationship which was far more intimate and pervasive than any relationship likely to result from the statute now under consideration" (J.S.-A.-20-21).

And of course, many constitutionally permissible forms of state aid are on-going, annual programs involving continuing financial relationships — viz, aid for school textbooks, school lunches, school health programs, school buses, etc.

Further, to elevate the "on-going" feature of the grants, into a constitutionally fatal factor, would be in effect to say that a State could not give *annual* construction grants. Surely the Court would not have proscribed grants by the State of Connecticut to the *Tilton* colleges simply because the State made available to each college a new grant in another year. We submit that the annual nature of grants can hardly in itself be a basis of unconstitutionality.

In summary, neither the absence of a limitation of a grant for a single supposedly "neutral" building nor the presence of an on-going program are significant points under the existing tests and the applications thereof, developed by the Supreme Court.

The District Court arrived at its decision by applying these tests and the related factors laid down by the Supreme Court, to the facts — including the facts that the institutions were at college rather than high school or elementary school level; that the institutions were non-sectarian liberal arts colleges; that the law provided a flat and all embracing prohibition against any

use of the funds for sectarian purposes; and that the program was administered by a state agency capable of establishing adequate relations and procedures to ensure such required use of the funds without undue surveillance.

II.

THE EQUAL APPLICATION OF THE FOURTEENTH AMENDMENT REQUIRES A FINDING FAVORABLE TO THE APPELLEE COLLEGES.

The Court should not apply to the Appellee colleges standards regarding impermissible religious features which it is not prepared to require to be applied to all other liberal arts institutions, whether Harvard, University of Virginia, Yale, Brandeis, the University of Maryland, or any others. Yet that is what the Appellants, in singling out the Appellees, are asking the Court to do, probably inspired by a feeling that Catholic sponsored education is especially prone to a missionary tendency.

Whatever may have been the religious orientation of Catholic sponsored educational institutions in the past, the day has long since gone when this Appellee liberal arts college had any such missionary role. Just as Harvard, Princeton and Yale originally had a strong Christian background and purpose, but gradually became secularized, so, as the evidence in this case makes transparently clear, the Appellee colleges have similarly become secularized. What remains of religion in the latter group, remains in the former, and is permissible.

Thus it is common knowledge, and in evidence in this case, that many if not most other liberal arts colleges, particularly but not exclusive the private ones, have:

(a) chapels, chaplains, and religious services,

(b) departments of religious studies or theology, with the attendant courses and teachers.

It is considered part of a rounded liberal arts education to make these features available.

If these features, separately or together, are not to be constitutionally fatal in the innumerable federal and state programs of government aid — a result which would have an enormous and adverse impact on education — neither should they be fatal to the Appellee colleges.

The Appellants may reply that besides these common features, in the Appellee colleges voluntary prayers will be said in buildings that would benefit from the aid; that there are more religious symbols in evidence; and that the Appellee institutions have a large proportion of students, faculty and trustees with a given religious affiliation which proves a *de facto* religious restriction.

As to the first two points: unless the Court is prepared to say that a program of possible aid must provide guarantees that the aid will not be used for any buildings in any institution in the country in which prayers might be voluntarily said by students or teachers or others, or that the aid must not benefit an institution where religious symbols and dress may be in evidence, it should not impose such requirements upon the Appellee colleges.

As to the religious affiliation of portions of the faculty, the student body and the governing body — in the first place it is absolutely false to say that if there is any requirement for a religious quota, or any attempt to impose a religious quota, on the faculty or student body at the Appellee college. But regardless of this, such affiliation has been held irrelevant to the issue in the

Tilton case; and it is indeed irrelevant both in logic and in the concrete operation of the Appellee college. The important thing is not the religious affiliation of the persons who attend or run the college, but *what the college does*. In this case, the Appellee does what other liberal arts colleges do: — it gives a broad liberal arts education without any intent or practice of instilling religion but with the intent of making available to students, in a free, non-indoctrinating, academic way, various options in human experience and knowledge, including among others, the religious field, just as other colleges not deemed vulnerable, such as Harvard, do.

III.

IF THE GRANTS ARE HELD UNCONSTITUTIONAL, REPAYMENT SHOULD NOT BE REQUIRED.

As is pointed out in the case of *Lemon v. Kurtzman*, 411 U.S. 692 (1973) there are equitable principles involved.

We submit that these principles do not favor repayment. Under the circumstances of financial stress and of imminent need of the colleges for funds, it would be more harmful and unjust to hold up payment for years while the constitutionality is being determined than to permit the payment to be made and the funds to be expended. For if the final result is that the grants are constitutional, a permanent damage may have been done to the college that could not get its funds when it needed them. Timely payment is of the essence with respect to those in dire need. On the other hand, if the ultimate finding is that the grants are unconstitutional, the damage to the individual taxpayer would not be as serious, and in fact, in this case, there would not be any damage at all. For the potential evils of aiding religion, which would be the only reason for unconstitutionality, *have not in fact* occurred at the Appellee college as a

result of the grants. Appellants have not shown, and could not show, that the funds were used to aid religion. At most it could be shown that the State funds went into the general operating account of Appellee and were earmarked and are being used for purposes which are clearly secular, beyond any controversy. This use does not even have the theoretical vulnerability that general grants to all the colleges and universities not under attack would have where a minute fraction of the unsegregated money could be deemed to be used to defray salaries of theology teachers, or lecturers or utilities for chapels, and the like. If such grants say to Harvard or Yale which have religious studies and chapels do not constitute an unconstitutional injury to the taxpayer, neither should it in the instant case.

This balancing of equities in favor of the Appellee colleges would not be as compelling if the State and the colleges had thrown caution to the winds and gone blindly ahead in the face of a probability of an adverse decision. But they did not do so. On the contrary that had, to reassure them at the very beginning, the decision in the *Tilton* case, which on its face certainly seem to justify the grants. On top of this, they waited for almost three years until the District Court, after a most exhaustive inquiry to the facts and consideration of the law, found that the grants were constitutional and that reliance on the *Tilton* case had been justified. Moreover, they did not receive the funds until after both the District Court and the Supreme Court refused the application of the Appellants to enjoin payment of the grants.

If the payment was allowed in *Lemon II* upon the general principle of the School's detrimental action in reliance upon the Pennsylvania Aid Program it would seem even more equitable to allow it in the instant case.

For in *Lemon II* the action in reliance was taken (a) before receipt of the payment, (b) in the face of an almost certain challenge of the validity of the program, and (c) in an untested and uncertain area of legality; and the Supreme Court still allowed the payment after the program was declared invalid. In the instant case the action in reliance was (a) not only before the payment (in the form of budgeting) but also *after* the payment (in the form of immediate and unrecoupable expenditure of the entire sum to meet the budget); (b) without any forewarning of the probability of a legal challenge; and (c) with the encouragement given by the *Tilton* decision which could be reasonably interpreted as an indication of the probable validity of the Maryland Program.

What would have been done by the College in the way of lessened expenditures or other adjustments if the grant had not been received cannot now be determined, nor would it seem necessary. In *Lemon II*, the Court noted the following:

> "(7-9) There has been no demonstration by the appellee schools of the precise amount of any detriment incurred by them during the 1970-1971 school year in the expectation of reimbursement by the state. The complexity of such a determination for each of Pennsylvania's 1,181 non-public schools that contracted with the State under Act 109 is readily apparent.[6] But we need not dwell on the matter of uncertainty. On this record the District Court could reasonably find reliance on the part of the appellee schools and reasonably could conclude no more was needed to demonstrate retrospectively the degree of their reliance."

93 S. Ct. 1463, p. 1471-2.

Footnote 6 reads:

> [6] "As to each school, the determination of actual reliance would be subtle, premised largely on credibility and not on facts of record. Nonreliance could not be assumed simply because expenditure levels remained constant before and after Act 109; any school might well assert that it would have reduced its educational expenditures in some particular but for the expectation of compensation for certain other expenditures incurred in connection with Act 109. Similarly, the inquiry could not be limited to the expenditures for those items specified by the Act. Increased expenditures for any of the gamut of a school's activities might have been incurred in reliance on reimbursement for services covered by Act 109."

CONCLUSION

For the reasons stated, we submit that the statute is neither generally unconstitutional nor unconstitutional in its applications to the Defendant colleges. There is no constitutionally significant difference between these Appellee colleges and the *Tilton* colleges; and as to the nature of the program, a general grant not to be used for sectarian purposes is no more vulnerable than a general grant for any type of buildings not to be used for a sectarian purpose.

The judgment of the Maryland District Court of three judges should be affirmed.

Respectfully submitted,

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